GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-043

WANDA M. FRANCIS,
Claimant-Petitioner,

v.

HOWARD UNIVERSITY HOSPITAL
and SEDGWICK CMS,
Employer/Third Party Administrator-Respondent.

Appeal from a March 26, 2014 Compensation Order on Remand
by Administrative Law Judge Linda F. Jory
AHD No. 06-040E, OWC Nos. 603915 and 606928

Benjamin T. Boscolo for Petitioner
William H. Schladt for Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HENRY W. MCCOY, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 30, 2004, Ms. Wanda M. Francis was working security at Howard University Hospital ("Howard").[1] On that day, she injured her cervical spine and right shoulder while struggling with a patient.

Ms. Francis was receiving temporary total disability benefits, medical benefits, and vocational rehabilitation services, but as of August 30, 2004, Ms. Francis asserted she was entitled to permanent total disability benefits. Howard refused to pay permanent total disability benefits, and the parties proceeded to a formal hearing before an administrative law judge ("ALJ").

[1] Although the caption of the Compensation Order lists Ms. Francis' employer as Howard University, it is clear from the evidence in the record that Ms. Francis' employer is Howard University Hospital.

In a Compensation Order dated January 16, 2013, the ALJ ruled Ms. Francis had not met her burden to prove she is entitled to permanent total disability benefits.[2] The Compensation Review Board ("CRB") vacated the Compensation Order on the grounds that the ALJ had not properly applied the burden-shifting analysis required by *Logan*[3] to determine Ms. Francis' entitlement to permanent total disability benefits.[4]

The ALJ issued a Compensation Order on Remand on March 26, 2014. The ALJ, again, denied Ms. Francis' request that she be adjudicated permanently totally disabled.[5]

On appeal of the Compensation Order on Remand, Mr. Francis' argues the Compensation Order on Remand

> is based on the Administrative Law Judge's medical opinion that Ms. Francis has not attained maximum medical improvement from the medical condition which her accidental injury caused. This conclusion is clearly erroneous for no less than three reasons. First, the Compensation Order on Remand's conclusion of law impermissibly converts a determination of disability from a question of fact to a medical question in violation of the Court of Appeals holding in *Wash. Post v. D.C. Dep't of Emp't Serv.*, 675 A.2d 37 (D.C. 1996). Second, the Compensation Order on Remand failed to apply the test enunciated by the District of Columbia Court of Appeals for determining whether a disability is permanent. *Logan v. D.C. Dep't of Emp't Services*, 805 A.2d 237 (D.C. 2002). These actions are both clearly erroneous and inconsistent with the plain language of the statute that they must be vacated and reversed.[6]

Because a "finding of permanent total disability does not require presentation of evidence that the injured worker has attained maximum medical improvement,"[7] Ms. Francis asserts her disability appears to be of lasting or indefinite duration and qualifies as permanent; therefore, she requests the CRB remand this matter for a ruling that her disability is permanent.

In response, Howard argues pursuant to *Logan*'s requirement that the claimant prove "(1) that his condition has reached maximum medical improvement and (2) that he is unable to return to his

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[2] *Francis v. Howard University*, AHD No. 06-040E, OWC Nos. 603915 and 606928 (January 16, 2013).

[3] *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

[4] *Francis v. Howard University*, CRB No. 13-013, AHD No. 06-040E, OWC Nos. 603915 and 606928 (September 26, 2013).

[5] *Francis v. Howard University*, AHD No. 06-040E, OWC Nos. 603915 and 606928 (March 26, 2014).

[6] Memorandum of Points and Authorities in Support of Application for Review, pp. 5-6.

[7] *Id.* at 6.

usual, ***or to any other***, employment as a result of the injury,"[8] Ms. Francis is not entitled to permanent total disability benefits. Howard requests the CRB affirm the Compensation Order on Remand.

ISSUE ON APPEAL

1. Did the ALJ err in ruling Ms. Francis' disability is not permanent?

ANALYSIS[9]

In order to be entitled to permanent total disability benefits, a claimant's disability must be both permanent and total. The parties concede Ms. Francis' disability is total;[10] therefore, the only issue for resolution is whether her disability is permanent.

To prove a disability is permanent, the claimant can prove that (1) maximum medical improvement has been achieved or (2) the disability has continued for a sufficient period of time that it is of lasting or indefinite duration and that the claimant is unable to return to employment:

> Relying on prior DOES decisions, the hearing examiner interpreted this definition as requiring a claimant to show (1) that his condition has reached maximum medical improvement and (2) that he is unable to return to his usual, or to any other, employment as a result of the injury. [Footnote omitted.] With one small adjustment, these proof elements are consistent with this court's understanding of the statute. Thus, we have said that "[a] disability is *permanent* if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Smith v. District of Columbia Dep't of Employment Servs.*, 548 A.2d 95, 98 n.7 (D.C. 1988) (emphasis added) (citing *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 86, 738 F.2d 474, 480 (1984)); *see also* 4 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.04, at 80-13 (Matthew Bender ed. 2002) ("Permanent means lasting the rest of claimant's life. A condition that, according

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[8] Employer/Insurer's Memorandum in Opposition to Claimant's Application for Review, p. 6. (Emphasis in original.)

[9] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[10] "Employer/Insurer did not challenge the condition that Claimant was totally disabled from her pre-injury employment." Employer/Insurer's Memorandum in Opposition to Claimant's Application for Review, p. 7.

to available medical opinion, will not improve during the claimant's lifetime is deemed to be a permanent one.").[11]

Having found Ms. Francis has reached maximum medical improvement, the ALJ focused on whether Ms. Francis' disability is of indefinite duration or not likely to improve during her lifetime.

Permanent total disability is a term of art in workers' compensation adjudication:

> It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.
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> While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered.[12]

Although Howard conceded that Ms. Francis' disability is total in that she cannot return to her pre-injury employment, it did not concede that her disability is of indefinite duration, and ruling that Ms. Francis has not met her burden in this regard, the Compensation Order on Remand states:

> In support of her claim for permanent total disability, claimant has submitted the records of her treating neurosurgeon Dr[.] Faheem A Sandhu; the records of Dr. Marc Rankin which predate claimant's cervical surgery, an IME report of Dr. Richard Conant from 2009, some vocational rehabilitation records and a Functional Capacity Evaluation dated August 22, 2011.
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> As the undersigned continues to be of the opinion that unsuccessful job search efforts alone or attaining the age of 60 in the course of job placement

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[11] *Logan, supra*, at 241.

[12] *Braswell v. Greyhound Lines, Inc.*, CRB No. 12-120, AHD No. 09-519A, OWC No. 603794 (November 13, 2012).

efforts do not automatically equate to a determination of permanent total disability, claimant's medical evidence of record has been thoroughly reviewed to determine if there is a medical opinion which will establish claimant's neck symptoms will not improve during the claimant's lifetime. A review of the most recent report in claimant's exhibit package is dated June 27, 2011. In this report Dr. Sandhu summarizes his treatment plan as:

> Given the fact that she has had two-level fusion in her neck, she has limitations in her range of motion of approximately 25% of her normal function. Additionally, I have recommended that she not continue in the same line of work as a security guard since she would be at risk for injuring her neck if she were in an altercation with an individual while she were working as a security guard. I do think she would be able to perform duties necessary for sedentary job such as a receptionist. Additionally, I still recommended that she follow up with pain management specialist, and she would benefit from facet blocks to the C4-5 level which may be the source of ongoing neck pain. I will plan to see her on an as-needed basis in the future.
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> CE 2 at 1[.]

Dr. Sandhu has not discharged claimant from his care nor has he opined that there is no other treatment he can offer her and it is the undersigned's opinion that Dr. Sandhu's opinion does not aid claimant in establishing that her condition will not improve in her lifetime or establishes that her current condition is permanent.

The undersigned further notes that while the functional capacities evaluation sets forth claimant's physical limitations, it is the conclusion of the rater that:

> During the Functional Capacity Evaluation, Ms. Francis provided a solid functional performance considering her age, her physical condition, and her injuries. She demonstrates a good rehabilitation potential to benefit form a Work Conditioning Program (it is not felt that Work Hardening is necessary in her case) that would be designed to provide her with a comprehensive exercise program that she can perform at home and in the community, improve her understanding of her condition through education, improve her symptom management strategies and improve her overall confidence in her physical ability to work moving forward. This may enhance her success with regard to vocational placement as she is in vocational rehabilitation program The time involvement in work conditioning would allow her to continue her vocational rehabilitation responsibilities. It must be noted that Ms. Francis potential (sic) to return to regular police

> officer duties that would expose her to physical altercations is poor and is not recommended by her surgeon. **Recommendations:** There are 2 possible recommendations. **Option # 1** would be for Ms. Francis to return to work within her tested physical demand level, identifying jobs within the LIGHT Physical Demand Level. **Option #2:** would be for Ms. Francis to participate in a 3 week conditioning Program. If the second option is chosen, the goals and plan are outlined on the following pages.

CE 4 at 4.

Similar to the opinion of the treating neurosurgeon, this FCE does not write claimant off as someone who is not able to return to some sort of gainful employment and offers very positive recommendations as opposed to a bleak forecast of what claimant cannot do.

Lastly, claimant submits the IME report of Dr. Richard Conant who on April 20, 2009, opined:

> In my opinion, she has long since reached maximum medical improvement with the functional capacity to perform at least light duty work, with avoidance of prolonged sitting, lifting of greater than 25 pounds and repetitive reaching above the shoulder level. I would anticipate her ability to increase her capabilities within two to three months.

Thus, while Dr. Conant was of the opinion, one year after her surgeries, that claimant had reached maximum medical improvement, this finding does not automatically equate to permanent disability especially when Dr. Conant conceded that claimant's capabilities would increase within two to three months.

In sum, the undersigned agrees with employer that claimant has not met her burden of proving by a preponderance of the evidence that she is entitled to a finding that her disability is permanent in nature at this point in time. While it may be established in the future -- a finding of permanent total disability is premature at this time as the medical records have not established that claimant's post[-]surgical neck condition is one "of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period" and employer is encouraged to provide the recommended work conditioning and pain management if it intends to provide ongoing vocational rehabilitation for claimant. *Logan, supra.*[13]

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[13] *Francis v. Howard University*, AHD No. 06-040E, OWC Nos. 603915 and 606928 (March 26, 2014), pp. 5-7.

Contrary to Ms. Francis' unsupported argument, the ALJ did not convert a disability determination into a medical determination. The ALJ followed the test set forth in caselaw in order to reach a reasonable and reasoned conclusion.

Finally, neither party appealed the ALJ's failure to address the issue of Ms. Francis' requirement to cooperate with vocational rehabilitation in light of the ruling that Ms. Francis is temporarily totally disabled. Of course, as stated in the extended quote from *Braswell*, *supra*, even had Ms. Francis been adjudicated permanently, totally disabled, she would have remained "under an obligation to cooperate with an employer's efforts to return that person to the labor market."[14]

CONCLUSION AND ORDER

The ALJ did not err in ruling that Ms. Francis' disability is not permanent. The March 26, 2014 Compensation Order on Remand is supported by substantial evidence in the record, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge

July 1, 2014
DATE

[14] *Braswell, supra.*